CANARY SONGS

AN UPDATE ON THE FSA'S TRIALS AND TRIBUNALATIONS

"A rare triumph for the regulator" said the Times when news of the Financial Services and Markets Tribunal's decision in Jabre was released. The FSA has indeed suffered recent defeats. Other decisions this year have been in its favour. This article considers the FSA's track record and the Tribunal's developing jurisprudence.

The Jabre decision attracted most media interest. Mr Jabre, a wealthy hedge fund manager, was found by the FSA's Regulatory Decisions Committee ("RDC") to have committed market abuse and breaches of FSA Principles after trading in the shares of a Japanese bank on the basis of inside information. He and his then-employers, GLG Partners, were each fined £750,000. Mr Jabre referred the matter to the Tribunal contending he had committed no offence; the FSA invited the Tribunal to find that Mr Jabre should be prohibited from the financial services industry, a harsher sanction than that imposed by the RDC. At a preliminary hearing, the Tribunal held that it had jurisdiction to prohibit Mr Jabre, making it clear that favourable findings of the RDC cannot be "banked" by Applicants for the purposes of hearings before the Tribunal.

Mr Jabre also argued that, as the relevant trades took place on the Japanese market, the trading was outside the territorial ambit of the market abuse

provisions. The Tribunal held that as the relevant Japanese bank's shares were traded in London, the territoriality requirements were satisfied.

In FSA v Rigby and Bailey, two directors of the software company, AIT, were convicted of recklessly making misleading statements to the market. They received custodial sentences and confiscation orders, parts of which related to the increase in the AIT share price which followed the misleading statement. Mr Rigby held AIT shares, which he did not trade before the share price dropped. The orders also confiscated the salary which the Defendants had received after committing the offence on the basis that, if their crime had been known, they would have been dismissed. The Court of Appeal overturned both elements of the orders, holding that, in the first instance, Mr Rigby had not *"derived a pecuniary advantage from the commission of the offence"* and that, in the second instance, there was insufficient causal link between the offence and the continued receipt of salary.

In Davidson, the Tribunal held, in dismissing the FSA's case, that market abuse was a criminal charge for the purposes of Article 6 of the European Convention on Human Rights but that the appropriate standard of proof remained the civil balance of probabilities – a standard which was flexible in its application. As the allegations of market abuse were *"very serious indeed"*, particularly in the light of the proposed penalty of £750,000, the Tribunal held that *"although there remains a distinction in principle between the civil standard and the criminal standard, the*

practical application of the flexible approach means that they are likely, in the context of these references, to produce the same or similar results."

This high test may present challenges to the regulator; a similar problem to that faced in Manchanda, where the FSA relied on the terms of a judgment in civil proceedings. The Tribunal accepted that *"it would be disproportionate for either Mr Manchanda or the FSA to have to incur the time or expense"* of re-litigating the allegations and considered the *"available material at what is necessarily a broad level."* Having heard oral evidence from Mr Manchanda, the Tribunal accepted that he was fit and proper.

In Sodha, the FSA relied on the disproportionate number of complaints which Mr Sodha had received, adduced evidence as to what an average level of complaints might be, and succeeded. The Tribunal held that Mr Sodha had *"an insufficient appreciation of the need, and an insufficient determination to comply with the requirements and standards of the regulatory system."* Intriguingly, the Tribunal did not specify whether this conclusion fell under the "integrity" or "competence" limb of the fit and proper test.

In conclusion, recent decisions of the Tribunal have indicated beyond doubt that it is willing to disagree with and dismiss the FSA's case where the high evidential standards are not satisfied. If, however, in the light of the evidence, the Applicant's behaviour appears worse than it did to the RDC during its administrative proceedings, the Tribunal has jurisdiction to increase the sanction

accordingly. Angels need not fear to tread in the Tribunal; for others, the stakes have increased considerably.

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